Appendix F

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 70-1305
56157

In re	)	
	)	
Formulation of Appropriate Further	)	Docket No. 19050
Regulatory Policies Concerning	)	
Cigarette Advertising and	)	
Anti-Smoking Presentations	)	

REPORT AND ORDER

Adopted: December 15, 1970 ; Released: December 16, 1970

By the Commission: Commissioners Bartley and H. Rex Lee concurring and issuing statements; Commissioner Johnson concurring in part and dissenting in part and issuing a statement.

1. On October 15, 1970, the Commission issued a notice to interested persons that comments may be submitted on appropriate further regulatory policies to be adopted with respect to two issues: (1) the possible fairness doctrine obligations, if any, in the situation where a broadcast licensee, which does not present cigarette commercials, broadcasts announcements to the general effect that cigarette smoking is hazardous to health and persons should therefore not commence or continue smoking (see complaint of Michael Handley, dated August 25, 1970), and (2) the public interest obligations of the broadcast licensee after January 1, 1971, when all cigarette advertising on broadcast media will cease (see petition for rule making filed October 13, 1970, by Action on Smoking and Health (ASH)). Comments were submitted by the Tobacco Institute, the Surgeon General, the American Cancer Society, National Tuberculosis & Respiratory Disease Assoc., Mr. Warren Braren, and several broadcasters or broadcast associations (see Appendix A for a list of these broadcasters). We shall briefly sketch the basic thrust of the comments, and then turn to our treatment of the issues.

2. The main thrust of the broadcasters' comments is that, after termination of the cigarette commercials, the Commission should not, and cannot properly, require licensees to present anti-smoking presentations, including the prescription of amounts of time to be devoted to such presentations. The comments rely on Commission reports such as the Report on Editorializing by Broadcast Licensees, 13 FCC 1246, (1949) and 1960 Programming Statement, 20 Pike & Fischer, Radio Regulation, 1902, 1915, to the effect that it is up to individual licensees to make judgments as to what issues or programming is to be presented. On the question as to whether, if a licensee did present messages pointing up the health hazard in smoking, it was required under the fairness doctrine to afford time for spokesmen to urge the opposite (i.e., that smoking

is not hazardous), the licensees split on their comments. Some, pointing to prior Commission precedents, stated their belief that fairness would require the presentation of pro-smoking viewpoints. Several others, however, stated their judgment and belief that in view of developments leading to Public Law 91-222, the general issue of cigarettes being a health hazard can reasonably now be regarded as no longer a controversial one.

3. ASH urges the adoption of a rule providing that "the obligation of a licensee to devote a significant amount of time to the presentation of views and information on the health hazards of cigarette smoking continues notwithstanding that it has discontinued the broadcasting of cigarette commercials sponsored by tobacco companies." It asserts that there is support for such a rule in the legislative history of the 1969 Cigarette Labelling and Advertising Act, and cites three grounds for the rule: (1) the strong public interest, in view of the health hazards involved; (2) the fact that "since the inception of commercial television, the viewing public has been bombarded by cigarette commercials," and the proposed rule is thus necessary to make up for the "decade of one-sided presentations and their lingering remnants . . ." (Pet. p. 7); and (3) that broadcasts presenting smoking in a favorable light (e.g., the hero smoking in some movie) ". . . will continue even after the Congressional ban on sponsored cigarette advertisements, as will so-called 'hidden commercials' now being promoted by the tobacco industry" (Pet. p. 10). ASH avers that smoking is still a controversial issue of the greatest importance.

4. The Tobacco Institute, on the other hand, urges that the present specific obligations of broadcast licensees to devote a significant amount of time each week to materials expressing the view that smoking is hazardous to health will not be applicable after January 1, 1971, because cigarette advertising on broadcast media will cease as a result of the Public Health Cigarette Smoking Act of 1969. It disputes ASH's supporting grounds, pointing out that broadcasters for almost three years have been informing the public concerning the health hazards involved. It further states that there is not the slightest basis for the "reckless" charge that the tobacco industry "is now taking steps to get hidden commercials on the air in violation of the spirit of the 1969 cigarette act." (ASH Pet. p. 10). The Institute argues that it would be wholly improper for the Commission to scrutinize programming content to ". . . search out broadcasts ostensibly presenting smoking in a 'favorable light.'" (p. 20) It argues that after January 1, 1971, the public interest obligations of licensees with respect to the issue of cigarette smoking will be the same as with respect to all other matters of public concern; that licensees have discretion to

determine that matters of public interest should be broadcast from among the multitude of such matters competing for broadcast time. Finally, it states that if licensees decide to exercise their discretion to carry anti-smoking materials, they will have an obligation under the fairness doctrine to provide reasonable opportunity for the presentation of materials expressing the view that smoking may not be hazardous to health. It urges that this is also the case in the period until January 2, 1971, if a licensee does not carry cigarette commercials but does carry anti-smoking messages.

DISCUSSION

5. We shall discuss the first question set out in paragraph 1 and then turn to the second question. However, the two questions are closely related, and thus the discussion here is also necessarily pertinent to our disposition of the second issue.

6. The first issue is the possible fairness doctrine obligations, if any, in the situation where a broadcast licensee, which does not present cigarette commercials, broadcasts announcements to the general effect that cigarette smoking is hazardous to health and persons should therefore not commence or continue smoking. As shown by the complaint of Mr. Michael Handley, that issue is presented today, since several stations have already dropped cigarette commercials but have continued to present general anti-smoking messages. Clearly, the issue becomes even more important after January 1, 1971, when all stations will cease carrying cigarette commercials.

7. We believe that this issue is to be disposed of under the accepted, long established principle in the general fairness area--namely, that it is up to the licensee to make a reasonable, good faith judgment on the basis of the particular facts before him as to the possible application of the fairness doctrine, and specifically whether he has presented one side of a controversial issue of public importance. Thus, we believe that little is gained here by citation of previous Commission rulings 1/ or by references to past testimony before the Congress. The critical issue here is the licensee's judgment today--directed to the circumstances before him.

8. The Tobacco Institute argues that the licensee's judgment is constrained--that we should hold that if a licensee presents messages going to the general health hazard (e.g., earlier mortality; lung cancer;

1/ E.g., Cigarette Advertising, 9 FCC 2d 921 (1967); Metromedia, Inc., 10 FCC 2d 16 (1967); Letter to Mr. Larry Jones, November 2, 1967, 8330-S; C9-1304; Letter to the Tobacco Institute, Inc., December 21, 1967, Ref.3300.

emphysema), with a call to stop smoking or not to begin, the broadcaster must provide a reasonable opportunity for the view that smoking may not be hazardous to health. Of course, broadcasters may, if they wish, present such a view, in light of their wide discretion.2/ But as stated, a number of broadcasters who filed comments in this proceeding have set forth their judgment that in light of developments, the general issue of smoking being a health hazard is no longer controversial. We decline to upset that judgment as unreasonable.

9. For, clearly, there have been most significant developments since the Surgeon General's 1964 Report which touched off a substantial controversy. Continuing massive studies have been made or completed in the ensuing years. The results of these studies were reported by HEW to the Congress pursuant to its direction in the 1965 Federal Cigarette Labelling and Advertising Act. Senate Report No. 91-566, 91st Cong., 1st Sess., p. 3, on the Public Health Cigarette Smoking Act of 1969, sets forth the significant conclusions from the HEW reports ("The Health Consequences of Smoking, 1967, 1968 and 1969"). These reports constitute overwhelming evidence on the general public health aspect of cigarette smoking.3/ We note further, as did the broadcasters referred to above, that Congress has acted on the basis of the reports. It has changed the labelling requirement from the phrasing, "Caution: Cigarette Smoking May Be Hazardous To Your Health" to the much stronger one: "Warning: the Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." It has barred all cigarette advertising on electronic media. And, both the cigarette industry and the broadcasting industry (the latter with a different phase-out period) agreed to such a bar during the legislative process leading to the 1969 Act. See Senate Report, supra, at pp. 9, 11. It is difficult to reconcile the cigarette industry's acquiesence in the 1969 ban, with its contention here that the broadcaster, who presents a general announcement that smoking constitutes a health hazard and therefore people should not begin smoking or should stop, cannot reasonably reach the judgment that the matter is not controversial--that he need not present offsetting material to the effect that smoking is no health hazard and people should commence or continue to smoke.

10. We wish to make clear that we are not issuing any blanket ruling covering every existing or future anti-smoking announcement, and could not properly do so, outside the context of a specific complaint. Our holding is directed to only one general aspect, albeit a most

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2/ Further, as we stated in our Notice of Proposed Rule Making in Docket No. 18434, 34 F.R. 1959, 1962, n. 30, the existence of governmental reports does not bar dissent thereto or the presentation of contrary views.

3/ Thus, in his comment in this proceeding, the Surgeon General stated it " . . . is the view of the Public Health Service that cigarette smoking, beyond controversy, is indeed hazardous to health."

important one--that cigarette smoking is a hazard to public health (i.e., the main cause of lung cancer; the most important cause of chronic bronchitis or pulmonary emphysema, etc.). While that facet may now be adjudged by the broadcaster no longer to be a controversial issue, there can clearly be most substantial controversies as to other aspects (e.g., particular studies or statistics; what remedial actions should be taken). As to such aspects, the fairness doctrine would be applicable, and we concur with CBS' comments in this respect (p. 4, CBS Comments):

> The Commission should leave to the judgment of licensees whether announcements dealing with the health hazards of cigarettes, which are broadcast after January 1, 1971, raise obligations under the fairness doctrine such as to require presentation of opposing views. These judgments must rest on the content and frequency of the announcements broadcast as well as the licensee's overall programming. In any event, it should be the licensee's initial responsibility to identify any issues raised and choose the appropriate reply spokesman where necessary. Those opposing any such announcements or seeking opportunities to respond would have available to them the Commission's normal procedures by which to seek redress.

11. The Tobacco Institute argues (p. 31) that refusal by the Commission to require licensees to afford time to spokesmen to present the viewpoint that smoking may not be hazardous would raise grave constitutional questions under Red Lion Broadcasting Co. v. F. C. C., 395 U.S. 367 (1969), since it would involve "the official government view dominating public broadcasting" and "a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves" (Red Lion, at p. 396). The argument is, we believe, specious. If broadcasters presented a Public Health Service bulletin urging that aspirin be kept out of the reach of children and citing statistics as to deaths caused in this way,such broadcasters would not be violating the Constitution if they rejected a request to present the viewpoint that aspirin poses no hazard in this respect. We realize that the example is far-fetched; our point is that the broadcaster can make judgments in this area and that if the judgments are reasonable, they do not constitute a violation of either the Act (Section 315(a)) or the Constitution.

12. The Tobacco Institute also cites (p. 34) Banzhaf v. F. C. C., 405 F. 2d 1082 (C.A.D.C. 1968), certiorari denied, 396 U.S. 842 (1969), in support of its argument. But that case holds squarely against the Institute's position. The Court there noted, (id. at pp. 1091-93) that

the Commission's holding was based really on the public interest standard rather than the fairness doctrine, and that that standard clearly comprehended a public health consideration such as this. See also Retail Store Employees Union v. F. C. C., F. 2d (C.A.D.C., 1970), Sl.Op., p. 18, n. 58. In the latter respect, the Court stated (405 F. 2d at p.1097):

> . . . The danger cigarettes may pose to health is, among others, a danger to life itself. As the Commission emphasized, it is a danger inherent in the normal use of the product, not one merely associated with its abuse or dependent on intervening fortuitous events. It threatens a substantial body of the population, not merely a peculiarly susceptible fringe group. Moreover, the danger, though not established beyond all doubt, is documented by a compelling cumulation of statistical evidence. The only member of the Commission to express doubts about the validity of its ruling had no doubts about the validity of its premise that, in all probability, cigarettes are dangerous to health. [Footnote omitted] 4/

The Court thus described the Commission's ruling as ". . . a public health measure addressed to a unique danger authenticated by official and congressional action . . ." (id. at p. 1099).

13. Most significantly, the Tobacco Institute argued in that case (Br. pp. 61-63) that the Commission had erred in holding that a licensee who has carried the cigarette commercials has covered one side of the issue on the behalf of the cigarette companies and is thus under no obligation to present further pro-smoking materials. It argued that

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4/ The Court then quoted the following statement of this member (id.at p.1098

> Cigarette smoking is a substantial hazard to the health of those who smoke which increases both with the number of cigarettes smoked and with the youthfulness when smoking is started. Cigarette smoking increases both the likelihood of the occurrence and the seriousness of the consequences of various types of cancer, of cardiovascular failures and of numerous other pathologies of smokers. These conclusions are established by overwhelming scientific evidence, by the findings of Government agencies, and by Congressional reports and statute . . .. The evidence on this subject is not conclusive, but scientific evidence is never conclusive. All scientific conclusions are probablistic. . .. Furthermore, law does not and cannot demand conclusive proof. Even in a capital case, the law requires only proof beyond a reasonable doubt. The evidence as to the dangers of cigarette smoking to the smoker is clearly beyond a mere preponderance and approaches proof beyond a reasonable doubt.

the commercials do not discuss the health hazard and indeed could not in view of FTC policies; that in any event they "certainly do not contain the explicit and detailed discussion of the issue which the FCC contemplates will be presented on behalf of the anti-smoking point of view"; and that therefore the FCC had no right to weight the scales in this fashion. The Court rejected this argument on the basis of its above-described public health rationale (id. at p. 1103).

> . . . the Commission did not abuse its discretion in refusing to require rebuttal time for the cigarette manufacturerers. The public health rationale which supports the principal ruling would hardly justify compelling broadcasters to inform the public that smoking might not be dangerous . . . .

14. We turn now to the second issue in our inquiry -- the public interest obligations of the licensee after January 1, 1971. The initial consideration is the request of ASH that broadcasters be required by rule to devote a significant amount of time to the presentation of views and information on the health hazards of cigarette smoking. We find no basis for such a rule in any of the grounds advanced by petitioner. Thus, as to the argument that there have been decades of cigarette commercials, we note that during the last three years anti-smoking material has been presented by licensees on a virtually daily basis, including during periods of maximum listening and in reasonable ratio to the commercials (see NBC, Inc., 16 FCC 2d 956 (1969)). There is no showing before us that this has not served to inform the public to a substantial degree of the health hazards of smoking--that prior decades of cigarette advertising call for something beyond this recent, three-years substantial effort. Similarly, there is no showing or basis before us to act upon the ASH's bare claim that the tobacco industry is planning to present "hidden commercials." 5/ Nor do we believe that we should act to require anti-smoking presentations because the stars on some TV shows or in some movies carried on television smoke cigarettes. This would involve intensive scrutiny by the Commission of entertainment programs to determine whether smoking was presented "in a very favorable light" (ASH Pet., p.10); in the case of movies particularly, it would involve a balancing of whether the hero or "heavy" is shown smoking, and to what extent. Were we to adopt this approach, we would be examining a multitude of drama and other entertainment programming with respect to a variety of every-day occurrences (e.g., a person taking a drink; driving a high-powered automobile).

15. Finally, ASH urges that the health hazard in smoking is so great that the public interest requires adoption of the rule which it urges. In support, it cites the legislative history of the 1969 Act; we have examined that legislative history and find that it does not support

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5/ If such abuses do occur, there will be a clear need for immediate and prompt remedial action. See Letter of Chairman Magnuson to FTC Chairman Kirkpatrick, Broadcasting Magazine, November 23, 1970, p. 46. However, the appropriate

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petitioner's position (see,e.g., testimony of Chairman Hyde, Hearings Before the House Committee on Interstate and Foreign Commerce, on H.R. 643, 91st Cong., 1st Sess., pp. 209, 226). In any event, the law in this area is well established. There are a number of pressing, important matters to which the licensee as a public trustee could direct its attention -- deaths caused by drunken driving; the health consequences of various forms of pollution; the Indo-China War; racial strife, etc. With the cessation of the cigarette commercials, it would be inappropriate to single out this one matter as the basis for a rule such as proposed by ASH.

16. While no rule is thus appropriate, we do not believe that our decision should end without further treatment of the licensee's responsibility in this general area. Indeed, in view of the comments filed by the broadcasters and our prior holdings (e.g., Letter to Mr. Soucie (Friends of the Earth), 24 FCC 2d 743, 750-51 (1970)), further discussion is warranted.

17. As we made clear in Letter to Mr. Soucie (Friends of the Earth), 24 FCC 2d at 751, n. 9, we agree that this is an area committed to the licensee's discretion -- that the Commission cannot properly compile any priority list. We have not done so, and have no intention of issuing a list of "must" issues. At the same time, it is simply not correct that the broadcaster has unlimited discretion to use his facilities as he wishes. As the Red Lion case stresses (supra, at p. 394), the licensee is ". . . given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern." See In re Democratic National Committee, 25 FCC 2d 216, 221-223 (1970); Report on Editorializing, 13 FCC 1246, 1249 (1949). The broadcaster is of course confronted with a host of issues; must make judgments as to which to cover and in what way; and clearly has very great discretion in making judgments in this area. But, as a matter of common sense and knowledge, there do emerge issues of overriding public concern. Such issues should become readily apparent to a licensee in the course of his "diligent, positive and continuing effort" to discover and serve the needs and interests of his community. In short, the licensee cannot ignore such matters and claim at renewal time that it is meeting the needs and interests of its area -- that it is fulfilling its "crucial" duty spelled out in Red Lion. We have held in the Democratic National Committee ruling, supra, that it is the broadcaster as public trustee -- not the affluent or powerful interest -- who determines the great issues on which the public must be informed; but that means that Red Lion, with its concept of public trustee, is controlling, and that "matters of great public concern" are given suitable time and attention. See par. 18, infra.

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5 cont'd/ action in such an eventuality would be to secure full and effective compliance with the 1969 law, and not to deal with it by offsetting anti-smoking messages.

18. A few broadcasters and the Tobacco Institute, in effect, urge that cigarette smoking is no longer a matter "of great public concern." See p. 15, Tobacco Institute comments (smoking does not have the "same prominence" as other national problems). We note that this contention runs counter to the reports on which Congress has acted (see para. 9, supra) and indeed the very fact that Congress has acted in the forceful manner of Public Law 91-222. See also the following portion of our Notice in Docket No. 18934:

> It is estimated that ". . . within ten years the death toll from these two diseases [emphysema and chronic bronchitis], which doubles every five years, could be well over 80,000." (The Dark Side of the Marketplace, 1968, by Senator Warren G. Magnuson and Jean Carper, p. 187). The annual number of deaths in the United States from cancer of the lung increased from 18,313 deaths in 1950 to 48,483 in 1965. [footnote omitted]. It is stated that "by 1976, unless the epidemic is checked, twice that number or 80,000 yearly, will die of the disease" (ibid). The 1967 Report indicates that cigarette smoking is associated with as much as one-third of all deaths among men between 35 and 60 years of age . . . .

to give but one further example, the comments of the Surgeon General state:

> There is nothing, in our opinion, which offers a greater or more immediate opportunity of reducing illness and premature death in this country than a national effort to reduce cigarette smoking. Radio and television can make an important contribution to this effort through their acceptance of public service announcements from Government and the voluntary agencies. If everyone were to give up cigarettes, be it remembered, early deaths from lung cancer would virtually disappear; there would be a substantial decrease in early deaths from chronic bronchopulmonary disease and a decrease in early deaths of cardiovascular origin 6/

6/ The American Cancer Society comment noted that the Clearinghouse on Smoking and Health estimates "that 1,200,000 youngsters will become cigarette smokers in 1970." The comments of the National Tuberculosis and Respiratory Disease Association notes that ". . . a recent study by the PHS indicates that there has been a recent rise in the number of teenagers who smoke."

Further, the question whether the licensee who fails to [illegible] this subject has served the public is one which can be definit[illegible] assessed only at renewal time when the licensee's overall [illegible]ic service performance effort is evaluated. We also note cu[illegible]l agreement with the proposition that which public service [illegible]ts are to be covered and how is for the licensee's judgment, [illegible]d on its evaluation in light of the competing public service d[illegible]s.

Conclusion

19. We have afforded general guidance to the extent reflected above. We dismiss the ASH petition for rulemaking and deny the relief requested by the Tobacco Institute. The proceeding is herewith terminated with adoption of this Report. IT IS THEREFORE ORDERED, That the petition filed by ASH IS DISMISSED, and the proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

Attachment

*See attached statement of Commissioner Bartley.
Statements of Commissioners Johnson and H. Rex Lee to be issued at a later date.

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CONCURRING STATEMENT
OF
COMMISSIONER ROBERT T. BARTLEY

I concur to the extent that after the effective date of the law (January 1, 1971), a licensee may well determine that serving the public interest requires that it continue the presentation of matter regarding the health hazards involved in cigarette smoking, and that it is likewise within the discretion of a licensee to adjudge that controversial issues of public importance exist on the subject, requiring the presentation of contrasting views in whatever forms of programming he deems most appropriate.